TESTIMONY ON SCHOOL FREEDOM OF CHOICE ACT

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By Marilyn J. Morheuser

Thank you for providing time for comments on the proposed "Freedom of Choice Act."

I wish to register Education Law Center's serious objections to the bill.

First, the provisions of this bill represent misplaced priorities. The Legislature has not yet dealt with its constitutional responsibility under the *Abbott v. Burke* decision. This is the first year of a Supreme Court required phase-in of relief requiring parity in per pupil spending between special needs districts and affluent districts. During this year, however, the amended QEA formula has driven disparities upward rather than downward. On average disparities have for the first time reached the $2,500 per pupil level in spending for regular education.

As compared to 1989-90 disparity levels examined by the Supreme Court, 27 of the 30 special needs districts have increased rather than decreased the difference between per pupil expenditures for regular education in their districts and in the I and J districts. Moreover, as we await anxiously for state aid and cap figures due for release this Friday, ELC's rough calculations demonstrate further trouble lies ahead.

We estimate that statewide foundation aid will increase next year by $94 million. If the state were to fund the special needs districts at the constitutionally acceptable phase-in level for next year, the special needs

districts alone would require more than twice that amount (or $209 million) in increased foundation aid.

The fact that plaintiffs are in court challenging your past actions does not diminish your constitutional duty. However, I am not here to reargue the plaintiffs' case with you. I mention it as only one of several serious problems with this bill. Before dealing with additional constitutional and social problems which it raises, I ask you to examine with me the potential cost implication for both the State and individual parents.

Cost Implications

At this time, any serious analyst of QEA funding would advise you that *more* State money must be spent on the public schools. Dr. Ernest Reock, for example, shows that although the State share of public school costs has reached 42% this year (in contrast to a national average of more than 50%), by 1995-96 state support under the QEA will fall to 39% or 36%, dependent on choices the Governor makes in recommending annual increases in maximum state aid. Reducing the percentage of state aid has the effect of sending local property taxes soaring again. Clearly what is needed now is substantially increased spending under the QEA, not new state spending on a discriminatory "school choice" scheme.

Against this backdrop, we have a bill which could drain the State treasury of more money for education without curing the underfunding in the QEA. Those sections of the bill triggering increased costs include: §14a (two year-long college courses for 11th and 12th graders at public or private institutions of higher education); §15b (State aid to school districts providing training for intradistrict school choice programs); and §15c (state payment for intradistrict choice schools' installation of educational

telecommunications connections. [Query: if such connections for instructional television and cable are educationally beneficial and necessary, why doesn't the State underwrite their costs for *all* public schools?]

What may result in the most prohibitive additional costs, however, is the scheme for State aid to receiving schools. See §5b, for example, which assures aid to nonresident public schools [the greater of (a) foundation aid per pupil in home district or (b) $2,600 (K-5), $2,900 (6-8), $3,600 (9-12)].

The added cost to the State results when foundation aid per pupil is less than $2,600 for a K-5 student. Here are examples of potentially increasing state costs whenever the State foundation aid per pupil is below the $2,600 level. For Rahway children (foundation aid per pupil of $520) or Hillside children (foundation aid per pupil of $1,885) transferring into Summit, the State would have additional costs of $2,080 and $715 for each Rahway or Hillside child respectively . Similarly, each Hoboken child (foundation aid of $391) transferring into Paramus would have to be subsidized with an additional $2,209; and each Garfield child transferring into Ridgewood would require additional state aid of $1,815. In Essex County, children from Bloomfield (foundation aid of $105 per pupil) and Belleville (foundation aid of $895 per pupil) would require additional state aid of $2,495 and $1,705, respectively. For New Brunswick children (foundation aid of $2,057) transferring into Princeton Regional, there will be an additional cost to the State of at least $543 per child.

The other side of the coin, however, is that parents must pay the difference between tuition charged by the nonresident school district and public money paid it for the transferring child. (§2c) Assuming the maximum permitted tuition rate of $6,640 or $6,972 (for a special needs

child in grades K to 5), parents seeking the transfers listed above from Rahway, Hillside, Hoboken, Garfield, Bloomfield, Belleville, or New Brunswick would be required to supplement State aid by paying either $4,040 or $4,372 per year per child, with the larger amount required for a special needs child. Add to these parental costs whatever transportation costs exceed the proposed aid limit of $675.

Of course we recognize that resident districts may, if they choose to, tax themselves more to permit their children to be educated elsewhere. I can hardly wait to suggest this to my mayor, Mayor Sharpe James.

The only conclusions that can be reached is that this bill effectively prohibits low income parents from transferring their children into affluent school districts. It does not matter whether or not this is its intent. It is the effect of the state payment schedule contained in the bill.

Rejection Standards

There are also problems with the reasons potential receiving districts may use to reject transfer applications. A permitted standard of rejection in §14c is the *capacity* of a program, class, grade level, or school building. Who will decide what the capacity is? Will the State set a standard for class size, something which it has been unwilling to do? Or may a nonresident district with 15 children per class claim lack of capacity to avoid accepting a low-achieving child, or a limited English speaking child, or a poor African-American child?

The history of attempts to frustrate the integration of public schools in both the North and the South of this country is filled with examples of such subterfuge. Will the State investigate every rejection permitted under this bill or must parents have constant access to lawyers who will challenge

rejections of their children?

Unconstitutionality

In addition to its potential for unconstitutional discrimination, this bill also authorizes unconstitutional State support for religion, in that it permits State aid to be used for the advancement of religion in nonpublic, parochial schools. See, for example, the U.S. Supreme Court decision, *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973).

In Nyquist, the State of New York provided tuition grants to students to enable the students to attend nonpublic schools. The Supreme Court found that, because a number of these "nonpublic schools" were parochial schools, the primary effect of the law was to advance religion. Under the Court's holding, the fact that monies went to students, rather than to the schools directly, was not enough to overcome unconstitutionality. Id. at 781-785. Moreover, had the monies gone directly to the schools, the law's unconstitutionality could not be questioned:

> There can be no question that these grants could not, consistently with the Establishment Clause, be given directly to sectarian schools. . . In the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid.

Id. at 780.

Here, the instant bill falls squarely within this definition of unconstitutionality: it provides monies directly to parochial schools with absolutely no attempt to assure that the funds allocated will be used for secular purposes. On this basis alone, that section of the bill permitting transfers to sectarian, nonpublic schools should be rejected by this

committee.

The Illusion of Choice

I began by characterizing this bill as an example of misplaced priorities, and I want to end that way. School choice -- in New Jersey and elsewhere -- is a cruel hoax on those who most need improvement in their education, our poorest children. We know that they now have very little of what they need in the schools they attend, and responsibility for that condition rests with the State.

We can assume that a bill offering "school freedom of choice" may well benefit some of these children *if* the district their parents choose agrees to participate, *if* a participating district accepts them, *if* their parents can afford to pay any supplemental tuition and/or transportation costs. But what of the children who do not make it out?

Those who are left behind are bound to be the poorest of the poor, probably children whose parents and grandparents before them have suffered similar denials of equal educational opportunity. And who will care about them?

Many who have administered and researched school choice have shared with us a standard which this committee should adopt. It is this: For school choice to be meaningful and equitable, *all schools* must be excellent. There must be no children left in schools which are not excellent. And that, I submit, is your duty under the constitution, a duty which has not yet been met.

Thank you for your time and attention.